IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Criminal Appeal No. 237 of 2005.
Reserved on: 3.11.2005.
Date of decision: 01. 2006.

Khoja Ram. **Appellant.**

Versus

State of Himachal Pradesh. **Respondent.**

Coram:

The Hon'ble Mr. Justice K C Sood, J.

Whether approved for reporting **?**[1]

For the Appellant: **Mr. Ravinder Thakur, Advocate.**

For the Respondent : **Mr. R.M. Bisht, Deputy Advocate General.**

K C Sood, J.

Appellant Khoja Ram (Accused for short), was tried and convicted for an offence punishable under Section 376 of the Indian Penal Code by the Presiding Officer, Fast Track Court Kangra at Dharamshala. He was sentenced to suffer rigorous imprisonment for seven years and to pay a fine of rupees 10,000/-. In case of default in the payment of fine, the accused is to under go further simple imprisonment for six months, by his judgment dated February 18, 2005

Dis-satisfied the accused is in this appeal.

Prosecution case:

Anita Devi, hereinafter referred to as the "victim", was twenty years of age at the relevant time. On May 11, 2002, her sister-in-law Usha Devi (PW4) along with her husband had gone to attend the marriage. When she returned back from the wedding at about 6.30 P.M., she gave a packet of sweets to the prosecutrix to deliver

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[1] ***Whether reporters of Local Papers may be allowed to see the judgment?***

it in the house of Rania Ram and also buy and bring soap from the shop but the victim did not return back till about 9.00 P.M. Usha Devi got worried and came out of the house in search of the victim. She saw the victim coming from the side of a nullah below along with the accused who fled towards his house. Victim was frightened. Usha Devi asked her the reason but she did not disclose anything. She took her to the house where she told her that Khoja Ram had sexually assaulted her. Her husband had not returned from the wedding. She waited for the arrival of her husband next day and report was lodged with the Police and FIR was registered on the statement of Usha Devi (PW4). The accused was arrested by Assistant Sub Inspector Krishan Gopal (PW13).

The victim was medically examined by Dr. Sushima Sharma, then Medical Officer, Civil Hospital, Nurpur (PW1) who found the hymen of the victim ruptured but healed. Carenculae myrtiformis was present. The uterus was normal and mobile fornices were clear. The victim was found to be mentally retarded. Dr. Sushima has recorded the age of the victim to be thirty years. There was no injury or violence mark on any part of the body of the victim. According to the opinion of Dr. Sushima Sharma, the possibility of sexual assault could not be ruled out. The victim was also examined by Psychiatrist who found the **victim to be mild to moderate mentally retarded**. Keeping in view the report of the Psychiatrist and medical examination of the victim, Dr. Sushima Sharma concluded that “possibility of sexual assault could not be ruled out”.

The trial court on appreciation of evidence of the victim, her sister-in-law, the Doctor and looking to the statement of the accused under Section 313 of the Code of Criminal Procedure, convicted the accused.

The conviction is assailed on the grounds:

a) The evidence of the victim could not be relied upon as she was mentally retarded;

b) The prosecution has failed to prove the case beyond reasonable doubt.

c) The Doctor who examined the accused found absence of smegma but at the same time blood stains were also found on glen penis of the accused which would go to show that accused had taken a bath after the occurrence.

d) There was no injury on the person of the victim which negatives the allegation of rape.

Heard Mr. Ravinder Thakur, learned counsel for the appellant and Mr. R.M. Bisht, learned Deputy Advocate General for the State.

So far the question whether the evidence of the victim is acceptable or not, learned trial Judge, while examining the victim, noticed that the witness was asked certain questions and from the answers to those questions, the witness was found “capable to make the statement”. It is the evidence of the victim that on the fateful day, she was carrying a packet of sweets to Rania Ram as given by her sister-in-law Usha Devi (PW4). She was accosted by the accused on her way to the house of Rania Ram. Accused caught hold of her, took her towards nullah. Accused touched her private parts, opened her salwar, laid her down on the ground, fiddled with her breast, penetrated his finger in her vagina and thereafter, penetrated his penis in her vagina. It is her evidence that accused had sexual inter course with her against her wishes. She also says that she did not do anything to the accused. It is her further evidence that in the meanwhile, her sister-in-law and brother

came there. She wept and disclosed the incident to her sister-in-law. She had also gone to the Hospital the next day with her sister-in-law. The clothes which she was wearing at the time of the incident, were taken by the Medical Officer and sealed them in a parcel. She identified the clothes taken into possession by the Doctor as Exhibits P1 and P2. In cross-examination she admits that the accused was working as labour in the construction of the house of one of his brothers. She also says that the house of the accused is near to her house. She also says that house of Rania where she was going is also located near her house. She says that it was quite dark when her sister-in-law met her. There is nothing material in the cross-examination of this witness which may dent her evidence or make it unacceptable. She denies the suggestion that sexual assault was not made by the accused on her. She admits that she suffered no injury on her person and her clothes were also not torn by the accused. She also admits that she named the accused when her sister-in-law asked as to who was with her. Learned trial Judge noticed that the witness was saying 'yes' to almost all the questions in the cross-examination, because of her mental inability to distinguish between the right and wrong. She also says that she made this statement at the instance of her sister-in-law.

It is true that the victim is mild to moderate mentally retarded as noticed by the Doctor and therefore, was unable to comprehend the suggestions given to her in her cross-examination but the suggestions which were given to her and which she affirms do not affect the prosecution case. Assuming, the victim was consenting party, no injury on any part of her body was found but such a consent by a mentally retarded victim would not be a free consent for the purpose of Section 376 of the Indian Penal Code.

Section 375 of the Indian Penal Code defines rape. It reads:

“375.- A man is said to commit “Rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First.-Against her will.

Secondly.- Without her consent.

Thirdly.- With her consent, when her consent has been obtained by putting her on any person in whom she is interested in fear of death or of hurt.

Fourthly.-With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.-With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.-With or without her consent, when she is under sixteen years of age.

Explanation.-Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.-Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

A reading of provision, noticed above, shows that if a person indulges in sexual intercourse with a woman under various circumstances would be said to commit a rape. Description fifthly very clearly indicates that if a person indulges in sexual intercourse with a woman even with her consent, when at the time of giving such consent by reason of unsoundness mind, she is unable to understand the nature and consequence of the act of which she gives consent.

In the present case, admittedly, the victim is a mentally retarded woman and was unable to distinguish between the right and wrong. Her consent for sexual intercourse therefore, would not constitute consent for the purpose of Section 376 of the Code. In the present case, the victim has made a positive statement that she was sexually assaulted by the accused against her wishes. This statement in any event is not dislodged in the cross-examination. Otherwise also, a mere act of helpless resignation in the fact of inevitable compulsion non-resistance or passive giving in, when volitional faculty is either clouded by any disability or fear or duress, cannot be deemed to be “consent” under the law. It is now well settled that consent on the part of a woman, as a defence to allegation of rape, requires voluntary participation, not only after the excise of intelligence based on the knowledge of the significance and the moral quality of the act, but also out of free exercise of choice between resistance and assent. In the present case, the victim was mentally retarded from mild to moderate extent and therefore, was not in a position to exercise her option for sexual inter course freely as she was unable to understand the significance and morality of the same.

Next is the question of proof. It is well settled that sole testimony of a victim, without corroboration, is sufficient, if believed, to convict the accused.

In the present case necessary assurance comes from the evidence of the victim, it is coming from the evidence of her sister-in-law Usha Devi (PW4) who states in her evidence that Anita Devi is a simpleton person. It is her evidence that on May 11, 2002, she had gone to attend a wedding of her relative along with her husband. The victim and her mother-in-law were in the house. The mother-in-law is old and is unable to walk. She returned back from the wedding and sent the victim with a sweet packet to give it to Rania Ram. When the victim did not return back for considerable time, then she went out to look for the victim and found her near nullah. She was frightened. At some distance, she saw accused Khoja Ram running towards his house. She brought Anita Devi to her house and enquired from her. She in turn informed her that Khoja Ram had committed rape on her. Her husband returned back from the wedding next day. They left their house to report to the Police at the Police Station but on the way, they met the police and made a statement (Exhibit PW4/A). There is nothing in the cross-examination of this witness which may make her testimony unacceptable or unreliable. Her testimony shows that victim had informed her immediately after the occurrence and there was no reason to falsely implicate the accused in an offence which involves honour and reputation of the family. Ganesh Kumar (PW5) is husband of Usha Devi. He says that when he returned back in the morning of May 12, 2002, his wife informed him about the occurrence. He consulted his other family members and left the house to lodge the report but the Police met them on their way to the house where report was lodged by his wife Usha Devi.

Assurance also comes from medical evidence. Accused was examined by Dr. Raman Sharma, Medical Officer, Civil Hospital, Nurpur (PW2) on May 12, 2002 at the instance of the Police. According to him, Khoja Ram, the accused, was brought to the Hospital with the history of he having committed rape on May 11, 2002. He found several injuries on the person of the accused. There was abrasion over his near nose on right side and near upper lip right side. Blood clots were present. There was abrasion over middle of the chest over sternum. There was also one abrasion over the shaft of penis. On examination of the penis, it was found that prepuse could be retracted, smegma was absent. He also discovered abrasion over the right knee joint with blood clots . There was also abrasion on the left knee joint. According to the opinion of this witness, injuries found on the person of the accused could be caused if a person commits forcible sexual intercourse on thorny place or hard surface. In cross-examination he says that all the injuries are possible in a manual work except injury No.3, i.e, abrasion over shaft of penis. Now absence of smega is strong evidence of recent sexual intercourse which also corroborates the testimony of the victim o that she was subjected to sexual intercourse by the accused.

Mr.Thakur, learned counsel for the appellant strenuously urged that evidence of the victim is not sufficient to convict the accused for a grave offence of rape. In the present case, it is true that the victim is mentally retarded. Corroboration may be looked to her evidence but evidence of a mentally retarded witness cannot be out rightly rejected particularly when the trial Judge, after having asked questions from this witness, concluded that she was a capable witness. The question whether a person has sufficient capacity to testify is a question of fact for the Judge to decide and

he may examine the person concerned if he finds the witness competent to testify (See: Mecelvery's evidence).

In the present case, as noticed earlier, even if corroboration of the evidence of the victim is to be looked for, such corroboration is furnished by the medical evidence and the evidence of her sister-in-law Usha Devi (PW4).

The evidence discussed above when tested on probability factor, clearly proves that the victim who was mentally retarded from mild to moderate extent was subjected to sexual assault by the accused and committed the offence of rape under Section 376 of the Indian Penal Code. The judgment of the trial Judge is not visited with any illegality.

No other point was urged.

In result appeal fails and is dismissed.

(K C Sood)
Judge.

January , 2006.